

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 171  
3138321

BETWEEN                      WILLIAM SIMPSON  
Applicant  
  
AND                              DIGG IT GIZZY LIMITED  
Respondent

Member of Authority:      Claire English  
  
Representatives:              Simon Greening, counsel for the Applicant  
Paul Fisher, counsel for the Respondent  
  
Investigation Meeting:      25 February 2022 at Gisborne  
  
Submissions received:      7 March 2022 from Applicant  
14 March 2022 from Respondent  
  
Determination:                2 May 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant was employed by the respondent on a fixed term contract to assist with cartage for the harvest season. The harvest was unexpectedly poor, and the respondent terminated the applicant's employment in a phone call. The applicant brings claims for unjustified dismissal and remedies resulting.

**The Authority's investigation**

[2]     For the Authority's investigation written witness statements were lodged from the applicant, and the two directors of the respondent. All witnesses answered questions

under oath or affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[4] The issues requiring investigation and determination were:

- (a) Was the applicant unjustifiably dismissed?
- (b) If the respondent's actions were not justified (in respect of the dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act
- (c) Should either party contribute to the costs of representation of the other party.

### **Background**

[5] The respondent (Digg It Gizzy) provides cartage, digger, and assorted landscaping services. It owns diggers and large trucks and assorted machinery. The directors of Digg It Gizzy are Mr Luke Hayes and Mr Josh Hayes. They are both actively involved in the work performed, and Digg It Gizzy also has a full time employee driver, named Bob.

[6] In addition, Digg It Gizzy routinely employs two drivers to assist with the pea and sweetcorn harvest, on a yearly basis.

[7] Once the harvest has started, carters will work 24 hours per day to take the produce to the local Cedenco processing plant.

[8] Two drivers will work 12 hour shifts each day, with one day off every week until the harvest is ended. Payment is on an hourly basis, and Mr Luke Hayes and Mr Josh Hayes both advised that they kept an eye on the hours worked each day and each week, as the drivers can only work a maximum number of hours in a day before a 10

hour break must be taken, and a maximum of 70 hours in any week. Towards the end of the week, eg on Fridays and Saturdays, Mr Luke Heyes and Mr Josh Hayes would make sure that one of them was available to act as a relief driver in case either of the two employees performing the cartage had met their maximum driving hours for the week. This did not happen every week, but could be expected to happen several times in a season, so Mr Luke Heyes and Mr Josh Heyes held themselves available to assist as needed.

[9] Mr Simpson is an experienced driver. He answered a face-book advertisement placed by Digg It Gizzy for a person able to drive a heavy truck.

[10] He first spoke with Mr Luke Hayes on the phone in October 2020, and then arranged to meet with him at the company's premises in Bond Road.

[11] When he visited, he met with both Mr Luke Hayes, and his brother Mr Josh Hayes. They showed him the truck that he would be driving carting peas and later sweetcorn during the harvest season.

[12] Mr Simpson was offered and accepted the job. He understood that he would start at the beginning of November, when the pea harvest commenced, and continue until approximately the end of April, when the sweetcorn harvest ended.

[13] In the interim, he was offered two other driving jobs, but turned them down, as he understood he was engaged by and for Digg It Gizzy.

[14] On about 1 November 2020, Mr Simpson was given a written individual employment agreement, which provided:

- a. The employment would be for a defined term.
- b. The duration of employment was for "the harvest". Mr Simpson, Luke and Josh were all in agreement that what was meant by this was the pea and sweetcorn harvests.
- c. The start date was 6 November 2020, and the finish date was 30 April 2021.
- d. Hours would be by agreement.
- e. Holiday pay was included in the hourly rate.
- f. Kiwisaver at the rate of 2% was payable on top of the hourly rate.

[15] In addition, Mr Simpson was to work days. Another fixed term employee named John was hired to drive the night shifts.

[16] On 1 November, the same day as he signed the individual employment agreement, Mr Simpson attended an induction course at Cedenco, to familiarise himself with the weighbridge, and the factory. He attended this course with Mr Josh Hayes and Bob. Mr Luke Hayes and John attended the same course on a different day. Mr Luke Hayes and Mr Josh Hayes explained that the purpose of themselves and Bob attending the course was to ensure that they were able to act as relief drivers in case of need.

[17] The harvest was expected to start on 6 November, but in fact started on 7 November. Mr Simpson's first day of work was on Sunday 8 November, and he also drove Monday and Tuesday. Wednesday and Thursday, there was no work due to rain. Mr Simpson then drove Friday and Saturday. Sunday was his rostered day off, and then he drove on Monday.

[18] On the evening of Monday 17 November, he received a phone call from Mr Luke Hayes. Mr Simpson said he was told the company had just lost a contract doing digger and excavation work. Mr Simpson inquired what that had to do with him, and then said words to the effect of "you're not telling me I don't have a job, are you?" The reply was "yes".

[19] Mr Simpson was left with the impression that Digg It Gizzy had lost a contract which was separate from the pea and sweetcorn cartage work he himself had been hired to do. Mr Simpson also understood that Mr Luke Hayes intended to put the full time employee (that is, Bob) into Mr Simpson's role.

[20] Mr Simpson was also aware that John continued to work the night shift carting peas and sweetcorn.

[21] After this call, Mr Simpson did not speak with Mr Luke Hayes or Mr Josh Hayes again. On 27 November, Mr Simpson texted Mr Luke Hayes, saying:

Hi Luke I havnt heard from you for over a week can you text me and confirm whether I have a job by 3 pm today. I have my log book in the truck . Could I arrange to pick it up.  
Cheers Bill

[22] Mr Luke Hayes replied saying:

Hi Bill this is formal notice that you no longer have employment at Digg It Gizzy Ltd  
The truck will be parked at Cedenco today at 2pm so you can grab what ever is yours out of it.  
I do apologise how this worked out cheers Luke

[23] This was the last contact between the parties. Mr Simpson then raised a personal grievance claim.

[24] There is a high degree of agreement between the parties as to the key facts. The main difference is in Mr Luke Hayes' recollection of the phone conversation between him and Mr Simpson on 18 November that ended Mr Simpson's employment.

[25] Luke advised that he had been out of telephone coverage for approximately 2 days, as he had been performing some work elsewhere. He noted that he had seen Mr Simpson and the other driver John successfully settled into the pea harvest cartage work, and his brother Josh, together with Bob, had successfully commenced another job in the Bay of Plenty. He explained he thought it would be "safe" to be out of contact for a short time to complete another job by himself, as everybody had work to perform.

[26] However, when he returned, he received two messages. One was terminating the Bay of Plenty digging work. One was from Cedenco, advising that because the pea harvest was extremely poor, Digg It Gizzy would only be offered 12 hours work per day going forward, not 24 hours as had been expected, and that this would be the night shift. Mr Luke Hayes said that this decision was conveyed to him by Cedenco, and he did not have a choice in either the amount of work available, or whether that work would be the day shift or the night shift.

[27] Mr Simpson had been employed to work the day shift, so he effectively had no work to perform.

[28] John continued to drive the night shift, because he had been employed to work the night shift.

[29] Mr Luke Hayes explained that Mr Simpson did not want to work the night shift, and this was suddenly, the only work that was available. Both Mr Simpson and Mr Luke Hayes used the same language, saying that Mr Simpson "preferred" the day shift.

[30] Mr Luke Hayes rejected the idea that Mr Simpson had lost his job because he had been replaced by Bob, and that the cartage work had carried on, with Bob being given the work that should have gone to Mr Simpson. Instead, he explained that the loss of the digger contract in the Bay of Plenty was unrelated, but had occurred at the same time as the halving of the cartage work. Mr Simpson had lost his job because he had been employed to cart peas during the day shift, and due to circumstances beyond Digg It Gizzy's control, the day shift cartage work had come to an abrupt and unexpected end after approximately 2 weeks. In addition, Digg It Gizzy had no other work at that time (due to the loss of the digger contract) that could be performed by Mr Simpson.

[31] Mr Luke Hayes acknowledged that the entire interaction he had with Mr Simpson was in a single phone call and the two text messages some days later. He accepted that he had not proposed any alternatives, such as job sharing, or that Mr Simpson might return for the sweetcorn harvest anticipated to start in mid-January. He said that in his view, this would not be sustainable or appropriate in any case.

[32] Mr Luke Hayes also emphasised that this was an unusual circumstance. He gave evidence that he himself had been involved in the cartage for Cedenco for the pea and sweetcorn harvest for some 8 seasons prior to this one, and the pea harvest had never been this bad before. When hiring Mr Simpson, he had genuinely expected to need the services of a full time driver through to April, which was why the individual employment agreement was written in the way that it was.

## **Findings**

[33] Mr Simpson was employed by Digg It Gizzy on a permanent fixed term contract. The work was to provide cartage services for the pea and sweetcorn harvest season. This was to be from approximately the start of November, through the end of April, with the exact start and finish dates being the start and end of the harvest.

[34] Although no fixed hours of work are stated in the employment agreement itself, which refers only to hours of work being by agreement, there is no disagreement that Mr Simpson would be driving the day shift, being approximately 12 hours per day, 6 days per week, with a maximum of 70 hours to be driven in any given week, to ensure compliance with the relevant maximum lawful driving hours.

[35] In addition, both parties understood that there would occasionally be days when the weather prevented work (indeed, this occurred during the period of employment and resulted in Mr Simpson not working by agreement on certain rainy days), and it was expected that there would be a break of some 3 or 4 weeks over the Christmas and New Year period, between the ending of the pea harvest, and the start of the sweetcorn harvest.

[36] Digg It Gizzy terminated Mr Simpson's employment by telephone discussion on 18 November 2022.

[37] The reason for terminating Mr Simpson's employment was due to the loss of the day shift cartage work for peas and sweetcorn, that Mr Simpson had been employed to perform. There was no other work available for Mr Simpson to perform. Mr Simpson effectively became redundant.

[38] There is no definition of what might constitute a redundancy situation in the individual employment agreement, however, the commonly accepted definition is a situation where a:

... worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer<sup>1</sup>.

[39] There is no dispute that Mr Simpson's employment came to an end as a result of the lack of work available, rendering Mr Simpson's services superfluous.

[40] The termination of employment by reason of redundancy is a dismissal<sup>2</sup>. It must be carried out for genuine economic reasons. It must also be carried out in a fair manner, which includes following the usual requirements to consult and provide notice and other supports. The test for justification of a dismissal under s 103A of the Act applies to redundancies as well as all other forms of dismissal, with the necessary modifications of the statutory language<sup>3</sup>.

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<sup>1</sup> *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA).

<sup>2</sup> See for example *New Zealand King Salmon Co Ltd v Slotemaker*, [2017] NZEmpC 99.

<sup>3</sup> The Court of Appeal has confirmed that "it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it thinks appropriate") in redundancy cases.", in the case of *Grace Team Accounting v Brake* [2014] NZCA 541, at [77].

[41] I accept that there was a genuine reason for the termination of Mr Simpson's employment, being the lack of work. This is not a situation where there is any suggestion of other motives. Indeed, Mr Luke Hayes was clear at the investigation meeting that there were no concerns with Mr Simpson's performance or conduct, and that he regretted not being able to provide Mr Simpson with the work that he had promised.

[42] There is no dispute that the termination was immediate, and without any process.

[43] This means that the process used to dismiss Mr Simpson was fatally flawed, in that there was no process. Mr Simpson was dismissed without notice, and without being given an opportunity to consider alternatives, or to take advice. The entirety of the termination process took place in the phone call between Mr Simpson and Mr Luke Hayes on 18 November, at the end of which, Mr Simpson's employment came to an end.

[44] This does not meet the statutory requirements of justification set out in section 103A of the Act.

[45] It is an unfortunate side effect of this lack of process that Mr Simpson was left with the impression that he was being dismissed because of the loss of a contract for digger and excavation work, that was unrelated to his own work, and that his employment had been brought to an end so that his job could be given to another longer-serving employee.

[46] I accept Mr Luke Hayes' evidence that (although Mr Simpson may have been left with that impression) this was not in fact the case, particularly in light of the detailed explanations he was able to provide about the two different contracts that Digg It Gizzy was working on at the time, and what happened next in terms of each of these contracts. I find that Mr Simpson and Mr Luke Hayes talked about the termination of both contracts in this key phone call, and it is entirely understandable that Mr Simpson received the impression that he did, that he was being replaced by another employee even though he himself had done nothing wrong. Although incorrect, this has

undoubtedly contributed to his stress – as he himself said, at the conclusion of this phone call, he felt he “went into a tailspin” and didn’t know what to think.

[47] The lack of any fair process means that the decision to dismiss was unjustified<sup>4</sup>.

[48] It was submitted for Digg It Gizzy that this was a situation where the contract had been frustrated by reason of the lack of work. I infer from the legal submissions on behalf of the respondent that I am being invited to find that, this being the case, there was no obligation on the respondent to meet the normal requirements of employment law when bringing Mr Simpson’s employment to an end, including in particular, the statutory requirements to a fair process.

[49] As I have already said, I have found that the situation was one that naturally fits into a redundancy situation as that has been recognised by the Courts, rather than frustration. I note the Court of Appeal’s comments in the case of *Karelrybflot v Udovenko and Ors*, that:

In view of the nature of a contract of employment the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees...<sup>5</sup>

[50] It cannot be correct that artificially classifying a situation where the employee’s employment has come to an end due to a lack of work available for that employee to perform as “frustration” rather than “redundancy” is sufficient to exempt an employer from complying with its statutory duties to act in good faith and as a fair and reasonable employer in accordance with sections 4 and 103A of the Act. In this regard, the Court of Appeal quoted with approval the maxim that:

The doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended<sup>6</sup>.

[51] The Court of Appeal also expressed the view that in the circumstances of that case, the the employer’s obligation could not be said to have become a thing radically different from that which had been originally undertaken<sup>7</sup>. I am of the view that that

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<sup>4</sup> The Court of Appeal has held that in a redundancy situation, “the decision to dismiss was in breach of s 103A and therefore unjustified. The fact that it was not a decision used as a pretext to remove an unwanted employee (and, therefore, “genuine”) did not alter the fact that s 103A was breached.” *Ibid*, at [105].

<sup>5</sup> *Karelrybflot v Udovendo and Ors*, CA129/99, at [37]

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*, at paragraph [38].

this comment also applies to the obligations of Digg It Gizzy. The ending of the work available may have been unexpected, but the statutory obligations to act in good faith towards Mr Simpson and to act towards him as a fair and reasonable employer including ensuring any dismissal (for whatever reason) met the statutory test of justification, remained unchanged.

[52] Digg It Gizzy's actions were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Its actions did not meet the test of justification set out in section 103A of the Act, which requires a fair process. As already indicated, there was no process, and Mr Simpson's dismissal is therefore unjustified.

[53] As a result of Mr Simpson's unjustified dismissal, he becomes entitled to claim remedies including lost remuneration, and compensation payments for humiliation, loss of dignity, and injury to feelings.

#### *Remedies*

[54] Mr Simpson has claimed for lost earnings of \$40,590 gross, which he has based on the length of time left to run on his fixed term, plus allowances for holiday pay and Kiwisaver.

[55] In support of his claim for lost remuneration for the full extent of the fixed term, Mr Simpson has provided evidence that he applied for some 20 jobs, and even went back to the companies he had turned down previously, to see if they could still find roles for him. He was unsuccessful.

[56] There are two points to consider when it comes to Mr Simpson's claim for lost remuneration. First, is it appropriate to award more than the usual three month's compensation? Section 128 of the Act provides that where an employee has a personal grievance, and the employee has lost remuneration as a result:

The Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[57] Mr Simpson claims for a total of 20 weeks and 3 days work, which he says was the amount of time left to run on the fixed term agreement, minus a 3 week period for

the Christmas break, which was the usual break between harvests. He has claimed wages payable at the rate of 12 hours per day, for 6 days a week, totalling 70 hours work per week.

[58] In response, Mr Luke Hayes pointed out that in his view, Mr Simpson's claim for lost remuneration was too high, as he could not have worked more than 70 hours in any given week, as he needed to comply with the maximum driving hours each week. In addition, Mr Luke Hayes pointed out that this made no allowance for "rain days", which would occasionally occur, or the potential for the harvest to end somewhat earlier than the estimated date of 30 April.

[59] Taking all this into consideration, I find it is appropriate to award Mr Simpson 13 weeks (or three month's) lost remuneration. This is to be calculated at the rate of 70 hours per week, as Mr Simpson could not legally have driven for the 72 hours per week claimed. Mr Simpson's contractual hourly rate is \$25 per hour, inclusive of holiday pay, but an additional 2% is payable on top of this as a contribution to Kiwisaver. This means that Mr Simpson's weekly rate is \$1,750.00 gross, plus 2%.

[60] Accordingly, Digg It Gizzy is ordered to pay to Mr Simpson:

- a. Lost remuneration for 13 weeks at the rate of \$1,750 per week, being \$22,750 gross.
- b. An additional payment of \$455.00 gross as a contribution to Kiwisaver.

[61] Mr Simpson has also claimed for compensation for hurt and humiliation. He gave evidence of the distress and humiliation the dismissal had caused him, including the difficulties it put him in with regards to meeting his rent payments, having made financial commitments on the basis that he would have full time work until the end of April. I also take into account the distressing and misleading impression that Mr Simpson was left with, (albeit I accept that this was inadvertent) that he had lost his employment in favour of another employee through no fault of his own. It might have been possible for Digg It Gizzy to have avoided some of this by better communication with Mr Simpson, or even for Mr Simpson to have performed other work (such as the pea harvest cartage), if such matters had been able to be explored between the parties.

[62] On balance, a sum of \$10,000 is payable in compensation for hurt and humiliation. Digg It Gizzy is ordered to pay Mr Simpson the sum of \$10,000 without deduction.

### **Orders**

[63] Digg It Gizzy is ordered to pay to Mr Simpson:

- a. Lost remuneration for 13 weeks at the rate of \$1,750 per week, being \$22,750 gross.
- b. An additional payment of \$455.00 gross as a contribution to Kiwisaver.
- c. \$10,000 without deduction as compensation for hurt and humiliation.

### **Costs**

[64] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves bearing in mind the Authority's daily tariff rate.

[65] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>8</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>8</sup> <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.